17-320

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 178.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRANK PHELPS AND HOWARD PHELPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 5, 1880.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States of America, plaintiffs, and Frank Phelps and Howard Phelps, defendants, a manifest error hath happened, to the great damage of the said the United States of America, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighteenth day of December, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

SAM'L BLATCHFORD.

DEC. 18, 1879.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-five, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of the United States of America, plaintiffs in error against Frank Phelps and Howard Phelps, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this seventeenth day of January, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the said United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsed:) U. S. Supreme Court. A. 248. The United States of

America, plaintiffs in error, against Frank Phelps and Howard Phelps, defendants in error. Original writ of error.

Due service of the within writ of of error is hereby admitted.

Dated New York, December 22, 1879.

BLATCHFORD, SEWARD,
GRISWOLD, & DA COSTA,
Att'ys for Def'ts in Error.

U. S. circuit court. Filed Dec. 23, 1879. John I. Davenport, clerk.

3 Circuit court of the United States, southern district of New York.

THE UNITED STATES OF AMERICA, PLAINTIFFS in error,
against
FRANK PHELPS AND HOWARD PHELPS, DEFENDANTS in error
} Error book.

Steward L. Woodford, United States attorney. Blatchford, Seward, Griswold & Da Costa, attorneys for defendants in error.

New York. Wm. A. Wheeler, jr., 206 Broadway, 1879. U. S. circuit court. Filed Oct. 2d, 1879. John I. Davenport, clerk.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the district court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said district court before you, between the United States of America, plaintiffs, and Frank Phelps and Howard Phelps, defendants, a manifest error hath happened, to the great damage of the said The United States, as by their complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the circuit court of the United States for the southern district of New York, together with this writ, so that you may have the same before said court on the th'rd Monday of October, eighteen hundred and seventy-nine, in the said circuit court to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done thereon, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the
5 said Supreme Court of the United States, the 12th day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

Sept. 12, 1879.

SAMUEL BLATCHFORD,
Circuit Judge.

(Endorsed:) U. S. circuit court. The United States, plaintiffs in error, against Frank Phelps and Howard Phelps, defendants in error. Writ of error. Steward L. Woodford, U. S. attorney. The return to the within writ of error appears in the annexed proceedings. Saml. H. Lyman, clerk. Oct. 2, 1879.

U. S. district court for the southern district of New York, in the second circuit.

Pleas before the judge of the district court of the United States of America for the southern district of New York, in the second circuit at the United States court buildings in the city of New York, of the term of June, 1878, to wit, of the 28th day of September, in the year of our Lord one thousand eight hundred and eight.

Witness the honorable William G. Choate, judge of the said court.

SAMUEL H. LYMAN, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 19th day of August, 1878, in June term, 1878, before the judge of the district court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came the United States of America, by Stewart L. Woodford, their attorney, and brought into the said court before the aforesaid judges
6 thereof, then there, their certain declaration against Frank Phelps and Howard Phelps, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

United States district court, southern district of New York.

THE UNITED STATES, PLAINTIFF,
against
FRANK PHELPS AND HOWARD PHELPS, DEFENDANTS.

The complaint of the plaintiff by Stewart L. Woodford, its attorney in the southern district of New York, shows on information and belief:

At all times hereinafter mentioned defendants were partners, trading in the city of New York, under the firm name of Phelps, Bros. & Co.

For a first cause of action:

On or about the 15th day of August, 1876, defendants imported into the port and collection district of the city of New York, from a foreign port or place, twenty-nine hundred and thirty boxes of lemons; said lemons were procured by defendants by purchase, and the actual cost thereof, in the foreign market when purchased, including all charges and commissions thereon, was nine thousand six hundred and twenty-three gold dollars; said goods were liable to an import duty of 20 per centum ad valorem, and there became due to plaintiff on such importation the sum of nineteen hundred and twenty-four $\frac{60}{100}$ gold dollars.

7 No part of said sum has been paid except the sum of sixteen hundred and thirty-six gold dollars.

And for a second cause of action:

On or about the 7th day of August, 1876, defendants imported into the port and collection district of the city of New York, from a foreign port or place, thirty-eight hundred and twenty-five boxes lemons; said lemons were procured by defendants by purchase, and the actual cost of said goods, including all charges and commissions thereon, was fourteen thousand three hundred and eighty-three gold dollars. Said goods were liable to a duty of twenty per centum ad valorem, and there became due to plaintiffs on such importation the sum of twenty-eight hundred and seventy-six and $\frac{60}{100}$ gold dollars. No part of said sum has been paid except the sum of two thousand and thirteen and $\frac{60}{100}$ gold dollars.

Wherefore plaintiff demands judgment against the defendants for one thousand one hundred and fifty-one and $\frac{60}{100}$ gold dollars, with interest on two hundred and eighty-eight $\frac{60}{100}$ dollars thereof from August 15th, 1876, and on eight hundred and sixty-three dollars thereof from August 15th, 1876, and costs.

STEWART L. WOODFORD,
United States Attorney.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Wm. V. Alexander, being duly sworn, says that he resides at No. 361 West 18th street, in the city of New York; that he is a special United States Treasury inspector; that he is familiar with the facts in the case; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the
8 matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

W. V. ALEXANDER.

Sworn to before me this 16th day of August, 1878.
[SEAL.] SUTHERLAND TENNEY,
Notary Public, N. Y. Co. (No. 52.)

United States district court, southern district of New York.

THE UNITED STATES, PLAINTIFF,
vs.
FRANK PHELPS AND HOWARD PHELPS, DEFENDANTS.

The defendants, by Blatchford, Seward, Griswold & Da Costa, their attorneys, in answer to the first cause of action:

I. A. Aver, that on the importation referred to in the first cause of action they paid to the plaintiff, on or about the 15th day of August, 1876, the sum of one thousand nine hundred and twenty-four dollars and sixty cents ($1,924.60) in gold, that being the full amount of the duty required by law to be paid thereon, on the supposition that all the lemons constituting such importation were sound. Thereafter, these defendants
9 ascertained that a portion of said lemons had become unsound before their arrival in the port of New York, and had been so landed

in that condition; and thereupon, and in accordance with the statute in such case made and provided, these defendants duly applied to the plaintiff for an allowance for damage on said importation. Thereafter the plaintiff duly made and allowed damage on the whole of said importation, and on the 29th day of September, 1876, duly liquidated the entry thereof, whereby it appeared that the sum of two hundred and eighty-eight dollars and sixty cents ($288.60) gold, had been overpaid by these defendants to the plaintiff, and which said sum the said plaintiff refunded to these defendants on the 11th day of October, 1876.

B. Deny each and every allegation in the said first cause of action contained, not hereinbefore admitted.

II. And for answer to the second cause of action these defendants:

A. Aver, that on the importation referred to in the second cause of action, they paid to the plaintiff, on or about the 7th day of August, 1876, the sum of two thousand eight hundred and seventy-six dollars and sixty cents ($2,876.60) gold, that being the full amount of duty required by law to be paid thereon, on the supposition that all the lemons constituting such importation were sound. Thereafter these defendants ascertained that a portion of said lemons had become unsound before arrival in the port of New York, and had been so landed in that conditon; and thereupon, and in accordance with the statute in such case made and provided, these defendants duly applied to the plaintiff for an allowance for damage on said importation. Thereafter the plaintiff duly made and allowed damage on the whole of said importation, and on the 3d day of October, 1876, duly liquidated the entry thereof, whereby it appeared that the sum of eight hundred and sixty-three dollars ($863) gold, had been overpaid by these defendants to the plaintiff, and which said sum the plaintiff refunded to these defendants on the 14th day of October, 1876.

B. Deny each and every allegation in the said second cause of action contained, not hereinbefore admitted.

Wherefore, the defendants demand that the complaint be dismissed with costs.

BLATCHFORD, SEWARD,
GRISWOLD & DA COSTA,
Attorneys for Defendants, 29 *Nassau Street*,
New York City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frank Phelps, being duly sworn, deposes and says that he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his knowledge, except as to those matters stated to be alleged on information and belief, and as to those matters, he believes it to be true.

FRANK PHELPS.

Sworn to before me this 28th day of September, 1878.

JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. N. Y.

11 District court of the United States, southern district of New York.

THE UNITED STATES
ag'st
FRANK PHELPS AND HOWARD PHELPS.

Afterwards the issues so joined came on to be tried before Hon. William G. Choate and a jury, at a district court of the United States, on the 15th day of April, 1879, and the said jury being duly empaneled and sworn render their verdict, and say that they find for the defendant.

Therefore it is considered that the plaintiffs take nothing by their said declaration, and that defendants be discharged without day.

Judgment signed May 29, 1879.

SAM'L H. LYMAN, *Clerk.*

Bill of exceptions.

District court of the United States, southern district of New York.

THE UNITED STATES
against
FRANK PHELPS AND HOWARD PHELPS.

And afterwards the issues joined in the said action came on to be tried at a stated term of the district court of the United States before the
12 Hon. William G. Choate, the district judge, and a jury, on the fifteenth day of April, 1879, in April term, 1879, on which day the said jury rendered a verdict in said cause for the defendant, and in the course of said trial, and before the rendering of the verdict therein, the counsel for the United States, the plaintiff, did take and allege sundry exceptions to the rulings and direction of the court, which said exceptions are hereinafter severally set forth.

To maintain the issues on the part of the United States, it was proved that defendants did, on the 7th day of August, 1876, import into the port and collection district of the city of New York, from Menton, a foreign port or place, 3,825 boxes of lemons; that the value of said lemons in the foreign market when and where they were purchased, was seventy-four thousand five hundred and twenty-one $\frac{09}{100}$ francs, equal to fourteen thousand three hundred and eighty-three dollars; that the duties thereupon, at the rate of twenty per centum ad valorem, amounted to twenty-eight hundred and seventy-six $\frac{60}{100}$ dollars, on which said sum the plaintiff gave a credit of $2,013. 60, the amount admitted by the complaint to have been paid, claiming the balance of $863.

That on the 15th day of August, 1876, defendants in *in* like manner imported 2,930 boxes of lemons, of the foreign value when shipped of forty-nine thousand eight hundred and sixty-one $\frac{89}{100}$ francs, equal to ninety-six hundred and twenty-three dollars; that the duties thereon, at the rate of twenty per centum ad valorem, were nineteen hundred and twenty-four $\frac{60}{100}$ dollars; on which said sum the plaintiff gave a credit of $1,636, the amount admitted by the complaint to have been paid, claiming the balance of $288.60.

Plaintiff then rested.

To maintain the issues on their part, defendants offered to prove that they made entry at the custom-house in New York of the first above-mentioned importation of lemons at the full invoice price on the
13 7th day of August, 1876, and then paid to the plaintiff the sum of $2,876.60, as the estimated amount of duty on said importation, if in sound condition, and afterwards, and on the 14th day of August, 1876, applied for an allowance for damage to the same on the voyage of importation, and that thereafter an examination and appraisement of the damage was made, and thereupon an allowance was made for said damage. The amount of said damage allowance was four thousand three hundred and fifteen dollars, and the duties thereon at twenty per cent. amounted to eight hundred and sixty-three dollars, in accordance wherewith the said entry was liquidated on the third day of October, 1876, and on the 14th day of October, 1876, the plaintiff refunded and paid to the defendants the said sum of $863.

(To this evidence plaintiff's counsel duly objected, on the ground that the damage allowance should have been applied for, and the damage ascertained before entry of the goods; that this application not having been made, nor the amount of damage ascertained until after entry, was irregular and without warrant of the law, and that defendants could acquire no benefit or advantage from any allowance made in pursuance thereof. The court overruled this objection, and admitted the evidence, to which ruling and admission plaintiff's counsel then and there duly took an exception.)

As to the importation of August 15, defendant offered to prove that an entry was made of the goods at its full invoice price, August 15, and the sum of $1,924.60 paid to the plaintiff as the estimated amount of duty on said importation, if in sound condition; application for damage allowance made August 22d; examination and appraisement thereupon made, and an allowance for damage thereupon made to the amount of
14 eight thousand one hundred and eighty dollars, on which the duties amounted to two hundred and eighty-eight $\frac{60}{100}$ dollars, and entry liquidated on the 29th of September, 1876, and on the 11th day of October, 1876, plaintiff refunded and paid to the defendants the said sum of $288.60.

Order Dec. 16, 1879.

(To this evidence plaintiffs' counsel duly objected on the same ground as before. The objection was overruled, the evidence was admitted, and plaintiffs' counsel then and there duly took an exception.)

Defendants then rested.

Plaintiffs' counsel thereupon requested the court to charge the jury that, as the goods had been entered at the full invoice prices in the first instance, and the application for allowance, the examination and appraisement not made, nor the damage ascertained, nor the damage allowance made until after the entries of the goods, the damage allowance was unwarranted by law, and they could not give the defendants any abatement of duties on account of such damage allowance.

The court refused so to charge, and plaintiffs' counsel then and there took an exception.

The jury rendered a verdict for the defendants.

And the said attorney for the plaintiff thereupon prays that the aforesaid exceptions may be signed and sealed, and inasmuch as the matters hereinbefore set forth do not appear in the record, the same having been reduced to writing, and being found correct, this bill of exceptions is allowed by the court, and directed to be filed as of the 15th day of April, 1879, before the jury left the bar.

WM. G. CHOATE.

N. Y., MAY 26, 1879.

15 Circuit court of the United States for the southern district of New York.

THE UNITED STATES OF AMERICA, plaintiffs in error,
against
FRANK PHELPS AND HOWARD PHELPS, defendants in error.

Afterwards, to wit, on the third Monday of October, 1879, before the judges of the circuit court aforesaid, at the city of New York, come the said the United States of America, by Stewart L. Woodford, esq., their attorney, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

That the court erred in allowing the defendants to introduce evidence of the payment of the estimated amount of duties upon their importation of the 7th day of August, 1876, of their subsequent application for an allowance for damage on the same on the 14th day of said month, of the examination, appraisement, and allowance of damage, and the reliquidation of the duties, and refund of so much thereof as had been paid on the goods allowed to have been damaged.

Also in this, to wit, that the court erred in allowing the defendants to introduce evidence of the payment of the estimated amount of duties upon their importation of the 15th day of August, 1876, of their subsequent application for an allowance of damage on the same on the 22nd day of the said month, of the examination, appraisement, and allowance of damage, and the reliquidation of the duties, and refund of so much thereof as had been paid on the goods allowed to have been damaged.

16 Also, in this, to wit, that the court erred in refusing to charge the jury (when so requested) that the damage allowance was unwarranted by law, and that the jury could not give the defendants any abatement of duties on account of such damage allowance.

Also, in this, to wit, in each particular pointed out by the exception taken by said attorney.

And this they, the said United States, by their attorney, are ready to verify; wherefore they pray that the judgment aforesaid, for the errors aforesaid, may be revoked, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment aforesaid, &c.

STEWART L. WOODFORD,
United States Attorney.

Circuit court of the United States for the southern district of New York.

THE UNITED STATES OF AMERICA, PLAINTIFFS in error,
against
FRANK PHELPS AND HOWARD PHELPS, DEFENDANTS in error.

And afterwards, to wit, on the third Monday of October, 1879, the said Frank Phelps and Howard Phelps, by Blatchford, Seward, Griswold and Da Costa, their attorneys, freely come here into court and say that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid; and they pray that the said circuit court
17 of judicature, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matter aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

BLATCHFORD, SEWARD,
GRISWOLD & DA COSTA,
Attorneys for Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

To Frank Phelps and Howard Phelps, greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States, to be holden at the U. S. court and post-office building, in the city of New York, on the third Monday of October, eighteen hundred and seventy-nine, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the southern district of New York, wherein the United States of America are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated New York, September 12th, 1879.

SAM'L BLATCHFORD,
Circuit Judge.

18 This is to certify that the annexed return has been compared by me with the original papers on file, and is a true copy thereof.

Witness my hand and seal of U. S. dist. court for so. dist. of New York this 2d day of October, 1879.

[SEAL.] SAM'L H. LYMAN, *Clerk.*

19 MONDAY, *October 20th*, 1879.

The court meets pursuant to law, and is opened by proclamation. Present, Hon. Samuel Blatchford, circuit judge.

THE UNITED STATES
vs.
FRANK PHELPS ET AL. } Cal. writs of error. No. 2.

The argument of the above cause upon writ of error coming on this day to be heard,

Mr. C. P. L. Butler, jr., assistant U. S. attorney, is heard in behalf of the United States, plaintiffs in error; Mr. Charles M. Da Costa is heard in behalf of the defendants in error.

Curia advisare vult.

Circuit court of the United States for the southern district of New York.

THE UNITED STATES, PLAINTIFFS IN ERROR,
vs.
FRANK PHELPS AND HOWARD PHELPS, DEFENDANTS IN ERROR.

BLATCHFORD, J.

This is a writ of error to the district court. The following facts appear by the bill of exceptions: The defendants in error (who were the defendants below and will be called the defendants) on the 7th of August, 1876, imported into the port of New York from a foreign port 3,825 boxes of lemons. The value of said lemons in the foreign market, when and where they were purchased, was $74{,}521\frac{9}{100}$ francs, equal to $14,383. The duties thereupon, at the rate of 20 per centum ad valorem, amounted to $2,876.60 on which sum the plaintiffs gave a credit of 2,013.60, the amount admitted by the complainant to have been paid, claiming to recover the balance, $863, as duties. The defendants in like manner imported on the 15th of August, 1876, 2,930 boxes of lemons, of the foreign value, when shipped, of $49{,}861\frac{89}{100}$ francs, equal to $9,623. The duties thereon, at the rate of 20 per centum ad valorem, were $1,924.60, on which sum the plaintiffs gave a credit of $1,636, the amount admitted by the complaint to have been paid, claiming to recover the balance, $288.60, as duties. After the plaintiffs had proven the foregoing facts, the defendants offered to prove that they made entry at the custom-house in New York, of the first above mentioned importation of lemons at the full invoice price on the 7th of August, 1876, and then paid to the plaintiffs $2,876.60, as the estimated amount of duty on said importation, if in sound condition, and afterwards, and on the 14th of August, 1876, applied for an allowance for damage to the same on the voyage, of importation; that thereafter an examination and appraisement of the damage were made, and thereupon an allowance was made for said damage; that the amount of said damage allowance was $4,315; that the duties thereon at 20 per cent. amounted to $863; that in accordance therewith the said entry was liquidated on the 3d of October, 1876; and that on the 14th of October, 1876, the plaintiffs refunded and paid to the defendants the sum of $863. To this evidence the counsel for the plaintiff objected, on the ground that the damage allowance should have been applied for and the damage ascertained before the entry of the goods; that as the application was not made nor the amount of damage ascertained until after the entry, the proceedings therefore were irregular and without warrant of law, and that the defendants could acquire no benefit or advantage from any allowance made in pursuance thereof. The court overruled the objection, and admitted the evidence, and to such ruling and admission the plaintiffs' counsel excepted.

As to the importation of August 15th, 1876, the defendants offered to

prove that an entry was made of the goods at their full invoice price on that day, and the sum of $1,924.60 was paid to the plaintiffs as the estimated amount of duty on said importation, if in sound condition; that an application for damage allowance was made August 22d, 1876; that an examination and appraisement were thereupon made, and an allowance for damage was thereupon made to the amount of $1,443, on which the duties amounted to $288.60; that the entry was liquidated on the 29th of September, 1876; and that on the 11th of October, 1876, the plaintiff refunded and paid to the defendants the said sum of $288.60. To this evidence the counsel for the plaintiffs objected on the same grounds as before. The court overruled the objection and admitted the evidence, and to such ruling and admission the plaintiffs' counsel excepted.

The defendants then rested. The counsel for the plaintiffs thereupon requested the court to charge the jury that, as the goods had been entered at the full invoice prices in the first instance, and the application for allowance the examination and the appraisement were not made, nor the damage ascertained, nor the damage allowance made until after the entries of the goods, the damage allowance was unwarranted by law, and the jury could not give the defendants any abatement of duties on account of such damage allowance. The court refused so to charge, and the counsel for the plaintiffs excepted to such refusal. The jury rendered a verdict for the defendants.

It is presented as a question for decision, whether there can be an appraisement for an abatement of duties, on account of damage to goods sustained during the voyage of importation, after the goods have been entered at the custom-house, and the estimated amount of duties thereon has been paid.

21 Section 2927 of the Revised Statutes provides as follows in respect to articles that have been damaged during the voyage, whether subject to a duty ad valorem *is* chargeable with a specific duty, either by number, weight, or measurement: "The appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage so ascertained and certified shall be deducted from the original amount subject to a duty ad valorem, or from the actual or original number, weight, or measure on which specific duties would have been computed. No allowances, however, for the damage on any merchandise that has been entered and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may, on examining the same, prove to be damaged, shall be made, unless proof to ascertain said damage shall be lodged in the custom-house of the port where such merchandise has been landed within ten days after the landing of such merchandise." This is a re-enactment of like provisions in sec. 52 of the act of March 2d, 1799. (1 U. S. Stat: at Large, 666.)

Section 2928 of the Revised Statutes provides as follows: "Before any merchandise which shall be taken from any wreck shall be admitted to an entry the same shall be appraised; and the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any merchandise shall have sustained in the course of the voyage; and in all cases where the owner, importer, consignee, or agent shall be dissatisfied with such appraisement, he shall be

entitled to the privileges of appeal, as provided for in this title." This section is taken from section 21 of the act of March 1st, 1823, (3 U. S. Stat. at Large, 736,) which section 21 was in these words: "Before any goods, wares, or merchandise which may be taken from any wreck shall be admitted to an entry, the same shall be appraised in the manner prescribed in the sixteenth section of this act; and the same proceedings shall be ordered and executed in all cases when a reduction of duties shall be claimed on account of damage which any goods, wares, or merchandise shall have sustained in the course of the voyage; and in all cases where the owner, importer, consignee, or agents shall be dissatisfied with such appraisement, he shall be entitled to the privilege provided in the eighteen' section of this act." The words, "In the manner prescribed in the sixteenth section of this act," found in said section 21, are not reproduced in section 2928 of the Revised Statutes. The manner prescribed in the sixteenth section of the act of March 1st, 1823, (3 U. S. Stat. at Large, 735,) is by appraisers to be appointed in a manner designated in that section.

By the 52d section of the act of 1799 it was provided that in the case of goods which had received damage during the voyage, the appraisement to ascertain such damage should be made by two merchant appraisers, one to be appointed by the collector and the other by the importer. By the 15th section of the act of April 20, 1818, (3 U. S. Stat. at Large, 437,) it was provided as follows: "Before any good, wares, or merchandise which may be taken from any wreck shall be admitted to entry, the same shall be prescribed by the ninth section of this act; and the same proceeding shall also be had when a reduction of duties shall be claimed on account of damage which any goods, wares, or merchandise imported into the United States shall have sustained in the course of the voyage." The 9th section of that act provided for the appointment by the President and Senate in each one of six designated ports of two appraisers, who, with a merchant appraiser to be chosen by the importer, were to make appraisements in such six ports, and in other ports appraisements were to be made by two merchant appraisers to be selected by the collector and one merchant appraiser to be chosen by the importer. This act of 1818 was to continue in force for two years. By the act of April 18th, 1820, it was continued in force till March 4th, 1823, (3 U. S. Stat. at Large, 563). Then came the act of March 1st, 1823, before referred to. The 16th section of that act provided for the appointment by the President and Senate in each one of seven designated ports, of two appraisers, who were to make appraisement in such seven ports, and in other ports appraisements were to be made by two merchant appraisers to be appointed by the collector.

22 A change was made by the act of 1818, and continued by the acts of 1820 and 1823, in the mode of appointing appraisers who were to appraise in the case of damaged goods. By the act of 1779 there were to be two appraisers, one appointed by the collector and the other by the importer. By the act of 1818 there were to be in certain ports two standing appraisers appointed by the United States and one appraiser selected in each case by the importer, and in other ports two appraisers selected in each case by the collector and one appraiser selected in each case by the importer.

This was continued by the act of 1820. By the act of 1823 there were to be in certain ports two standing appraisers appointed by the United

States, and in other ports two appraisers appointed in each case by the collector. The change made by the act of 1818 from the act of 1799, in the mode of selecting the appraisers was a marked and material one, as it gave to the United States the selection of two appraisers and to the importer the selection of one, instead of giving to the United States the selection of one and the importer the selection of one. Hence, when the 15th section of the act of 1818 said that "the same proceedings shall also be had" on a claim to a reduction of duties on account of damage, the reference would seem to have been to an appraisement "in the manner prescribed" by the ninth section of that act, without any prescription that it should be before or after the entry of the goods. The appraisement is a proceeding. By the 52d section of the act of 1799 appraisement *and* to ascertain damage was to be made by appraisers appointed in a manner prescribed by that section. By the 15th and the 9th sections of the act of 1818 such appraisement was to be made by appraisers appointed in a different manner. The requirement of the 15th section of the act of 1818, that goods taken from a wreck shall not be entered until they have been appraised, is clear and explicit. Prior to that act goods taken from a wreck could have been entered as other imported goods before appraisement, and were within the provisions of law as to goods damaged during the voyage. Reasons can very well be suggested why a change was made in regard to wrecked goods coming into the country in an irregular way, and not by the discharge of them at a landing wharf directly out of the vessel which brought them, such change requiring them to be appraised before entry. But no satisfactory reasons can be assigned for a like change in regard to damaged goods landed in the regular way, and it ought to appear very clearly from the language of the statute that a change was intended in regard to such goods. The system prescribed by the act of 1799 and continued in force, in regard to the landing of goods regularly imported, was that they should first be entered, and the duties on them be paid or secured, and then a permit be obtained for their landing, and severe penalties were imposed for landing goods without a permit. (Act of March 7, 1779, ss. 49, 50; 1 U. S. Stat. at Large, 664, 665.) It is impossible for an importer to ascertain, until he sees his goods, after they have been landed in pursuance of a permit following an entry, whether they have been damaged or not. Hence, the 52d section of the act of 1799 clearly provides for the entry, the payment of duties, the permit, and the landing, in the above order, and then for the allowance for damage. It ought to require explicit language to make a change in this order or proceeding. It was very proper to require that proof of damage should be lodged within ten days after the landing. But to require appraisement before entry or landing, in the case of goods regularly imported, would be to prescribe a system impossible of practical execution. These views apply to the provisions of the 21st section of the act of 1823. The natural meaning of the words of that section which provides that "the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any goods, wares, or merchandise shall have sustained in the course of the voyage" is the same as the natural meaning of the words in the 15th section of the act of 1818, which provides that "the same proceedings shall also be had when a reduction of duties shall be claimed on account of

damage which any goods, wares, or merchandise imported into the United States shall have sustained in the course of the voyage," and that is that the appraisement proceedings shall be conducted in the manner before prescribed in the acts respectively, and not that goods regularly imported and landed and not "taken from any wreck" shall be appraised before entry.

23 In the case of Shelton v. Austin (1 Clifford, 388), affirmed by the Supreme Court as Shelton v. The Collector (5 Wallace, 113), the 52d section of the act of 1799 had not been complied with, in that proof to ascertain the damage had not been lodged within the ten days prescribed by that section. The goods were not taken from a wreck, but they were entered before they were appraised. Mr. Justice Clifford, in the circuit court, held that they must pay duties on their sound value as entered, because under the 21st section of the act of 1823 they were required to be appraised before entry, in order to warrant an allowance for damage on the voyage. In the Supreme Court no counsel appeared for the plaintiff in error. The court held that there could be no allowance for damage under the act of 1799, because proof had not been lodged within the ten days after landing; and that there could be none under the act of 1823, because there had been an entry before appraisal. The first ground was an adequate one for the affirmance of the judgment, and the United States above represented on the argument. In the present case the record shows that the requirements as to the ten days was complied with.

By section 5595 of the Revised Statutes, those statutes are declared to embrace the statutes of the United States, general and permanent in their nature, in force on the 1st of December, 1873. It follows that the provisions of the Revised Statutes are to be construed as the enactments in force on the 1st of December, 1873, would have been construed. Sections 2927 and 2928 of the Revised Statutes are both of them enacted as having been in force on the 1st of December, 1873. The regulations of the Treasury Department in regard to claims for damage allowance, in force and acted on since the Revised Statutes were enacted, clearly recognize the practice and the propriety of entering goods and then claiming a damage allowance on them, and proceeding to an appraisement. Such was the practice in the present case acted on by the collector, even to the paying back of the deposited duties on the amount of the damage.

It is contended for the United States that under the 21st section of the act of 1873 goods damaged in the course of the voyage, though not taken from a wreck, must be appraised before entry in order to warrant an allowance for damage; and that as in this case the entry was made before appraisal, no allowance for damage is lawful. The district court took a different view. The practice of the Treasury Department of the collector has evidently been contrary to what is now contended for by the United States, notwithstanding the decision of the Supreme Court in Shelton v. The Collector. This practice, it is fair to assume, has obtained, because the Treasury Department did not regard that decision as disposing of the question finally. It is important that the question should be speedily decided by the Supreme Court, both in the interest of the government and of importers; and, in view of all the facts of the case, I think that the most proper disposition of it is to affirm the judgment below, and thus enable the United States to obtain speedily a reconsideration of the ques-

tion by the Supreme Court, instead of sending the case back for a new trial in the district court, with a long delay before it can reach the Supreme Court.

The judgment is affirmed.

C. P. L. Butler, jr., assistant district attorney, for the plaintiff in error.
Charles M. Da Costa for the defendant in error.

(Endorsed:) Circuit court of the United States for the southern district of New York. The United States, plaintiffs in error, vs. Frank Phelps & Howard Phelps, defendants in error. Decision. Nov. 18, 1879. U. S. circuit court. Filed Nov. 18th, 1879. John I. Davenport, clerk.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 25th day of November, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, the honorable Samuel Blatchford, circuit judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS in error,
vs.
FRANK PHELPS AND HOWARD PHELPS, DEFENDANTS in error.

The issues joined on the writ of error allowed on the 12th day of September, 1879, in this action, which was originally commenced in the
25 district court of the United States for the southern district of New York, by the United States of America as plaintiffs against Frank Phelps and Howard Phelps as defendants, and in which action a judgment was entered on the verdict of a jury, in the said district court, on the 29th day of May, 1879, in favor of the said defendants, and adjudging that the plaintiffs take nothing by their declaration, and that the defendants be discharged without day, having come on to be heard in regular order on the said writ of error and on the record from the said district court:

Now, on hearing C. P. L. Butler, jr., esq., assistant United States district attorney, on behalf of the plaintiffs in error, in support of said writ of error, and Charles M. Da Costa, esq., on behalf of the defendants in error, in opposition thereto, it is, on motion of Blatchford,
26 Seward, Griswold & Da Costa, attorneys for the defendants in error, ordered, adjudged, and decreed, and the court now here, by virtue of the power in it vested, doth order, adjudge, and decree that the judgment entered herein in the district court of the United States for the southern district of New York on the 29th day of May, 1879, in the action brought by the United States of America as plaintiffs against Franks Phelps and Howard Phelps as defendants, and from which said writ of error was taken, be, and the same hereby is, in all things affirmed.

SAM'L BLATCHFORD.

(Endorsed:) C. C. U. S., S. D. N. Y. The United States of America, plaintiff in error, against Frank Phelps and Howard Phelps, defendants in error. Order of affirmance. Blatchford, Seward, Griswold &

27 Da Costa, att'ys for defendants in error, 29 Nassau st., New York. U. S. circuit court. Filed Nov. 25, 1879. John I. Davenport, clerk.

28 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, plaintiffs in error,
against
FRANK PHELPS AND HOWARD PHELPS, defendants in error.

Afterwards, to wit, on the second Monday of October, 1880, before the justices of the Supreme Court aforesaid, at the city of Washington, came the said the United States by Stewart L. Woodford, esq., their attorney, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

That the court erred in allowing the defendants to introduce evidence of the payment of the estimated amount of duties upon their importa-
29 tion of the 7th day of August, 1876; of their subsequent application for an allowance for damage on the same on the 14th day of said month, of the examination, appraisement, and allowance of damages, and the reliquidation of the duties, and refund of so much thereof as had been paid on the goods allowed to have been damaged.

Also, in this, to wit, that the court erred in allowing the defendants to introduce evidence of the payment of the estimated amount of duties upon their importation of the 15th day of August, 1876; of their subsequent application for an allowance of damages on the same on the 22d day of the said month; of the examination, appraisement, and allowance of damages, and the reliquidation of the duties and refund of so much thereof as had been paid on the goods allowed to have been damaged.

30 Also, in this, to wit, that the court erred in refusing to charge the jury (when so requested) that the damage allowance was unwarranted by law, and that the jury could not give the defendants any abatement of duties on account of such damage allowance.

Also, in this, to wit, in each particular pointed out by the exceptions taken by said attorney.

And this they, the said United States, by their attorney, are ready to verify; wherefore they pray that the judgment aforesaid, for the errors aforesaid, may be revoked, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment aforesaid, &c.

STEWART L. WOODFORD,
United States Attorney.

(Endorsed:) Supreme Court of the United States. The United
31 States of America, plaintiffs in error, against Frank Phelps and Howard Phelps, defendants in error. Assignment of errors. Stewart L. Woodford, U. S. attorney.

Due service of a copy of the within is hereby admitted.
New York, Dec. 22d, 1879.

BLATCHFORD, SEWARD,
GRISWOLD & DA COSTA,
Atty's for Def'ts in Error.

U. S. circuit court. Filed Dec. 23d, 1879. John I. Davenport, clerk.

32 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFFS in error,
against
FRANK PHELPS AND HOWARD PHELPS.

And afterwards, to wit, on the second Monday of October, 1880, the said Frank Phelps and Howard Phelps, by Blatchford, Seward, Griswold, and Da Costa, their attorneys, freely come here into court and say that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid; and they pray that the said Supreme Court of the United States may proceed to examine as well the record and proceedings aforesaid as the matter aforesaid above assigned
33 for error, and that the judgment aforesaid, in form aforesaid given, may be in all things approved, &c.

BLATCHFORD, SEWARD,
GRISWOLD & DA COSTA,
Attorneys for Defendants in Error.

(Endorsed:) Supreme Court of the U. S. The United States of America, pl'ffs in error, against Frank Phelps and Howard Phelps, def'ts in error. Joinder in error. Blatchford, Seward, Griswold & Da Costa, attorneys for defendant in error. U. S. circuit court. Filed Dec. 23d, 1879. John I. Davenport, clerk.

34 UNITED STATES OF AMERICA, *ss:*

To Frank Phelps and Howard Phelps, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The United States of America are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated New York City, December 18th, 1879.

SAM'L BLATCHFORD,
Judge of the Circuit Court of the United States
for the Southern District of New York.

35 (Indorsed:) A 248. U. S. Supreme Court. The United States of America, plaintiffs in error, against Frank Phelps and Howard Phelps, defendants in error. Original citation.

Due service of the within citation is hereby admitted.
Dated New York, December 22, 1879.

BLATCHFORD, SEWARD,
GRISWOLD & DA COSTA,
Att'ys for Def'ts in Error.

U. S. circuit court. Filed Dec. 23, 1879. John I. Davenport, clerk.

(Indorsement on cover:) No. 178. The United States, plaintiff in error, vs. Frank Phelps & Howard Phelps. S. New York C. C. U. S. Filed 5th February, 1880.

17320

OFFICE SUPREME COURT U.S.
FILED
MAR 8 1883
JAMES H. McKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
FRANK PHELPS AND HOWARD PHELPS. } No. 178.

BRIEF FOR THE UNITED STATES.

10182

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
FRANK PHELPS AND HOWARD PHELPS. } No. 178.

BRIEF FOR THE UNITED STATES.

This is an action brought in the United States district court for the southern district of New York by the United States to recover from the defendants, Phelps Brothers & Co., certain duties alleged to have been illegally refunded to them by the collector of the port of New York.

The case is this: On the 7th August, 1876, the defendants imported into the said port 3,825 boxes of lemons, the value of which was $14,383 in gold, and the duty on which, at 20 per cent. ad valorem, was $2,876.60 in gold.

On the 15th of August, 1876, the defendants imported 2,936 boxes of lemons, of the value of $9,623 in gold, the duty on which, at 20 per cent. ad valorem, was $1,924.60 in gold.

These duties were paid by the defendants; but after the delivery of the merchandise to them it was discovered that the same had sustained damage during the respective

voyages of importation, and said damage having been duly appraised to defendants at $4,315 as to the importation o 7th August, 1876, and at $1,443 as to the importation of the 15th August, 1876, and the respective entries having been duly reliquidated, the defendants applied in the one case for an allowance for damage on the 14th of August, 1876, and in the other on the 22d August, 1876, and 20 per cent. of the said amounts of $4,315 and $1,443 was refunded to the defendants by the collector, to recover which, as illegally refunded, this action is brought.

On the trial of the action the government proved the value of the merchandise by the custom-house entry as originally liquidated and the amount of duties due, after allowing credit for what had been paid, and rested.

The defendants then offered evidence of damage, and allowance for damage, as above stated, to the admissibility of which the plaintiff objected, on the ground that the damage allowance was not applied for and the amount of damage not ascertained before entry, as required by law.

But the evidence was admitted as to both importations, and the plaintiff excepted to the ruling. (R., pp. 6-8.)

The defendants then rested, and thereupon the plaintiff asked the court to instruct the jury—

> That as the goods had been entered at the full invoice prices in the first instance, and the application for allowance, the examination and appraisement not made, nor the damage ascertained, nor the damage allowance made until after the entries of the goods, the damage allowance was unwarranted by law, and they could not give the defendants any abatement of duties on account of such damage allowance.

But the court refused to give the instructions, and thereupon the plaintiff excepted. (R., pp. 6–8.)

There was a verdict and judgment for the defendants. (R., p. 6.)

This judgment was affirmed on error to the circuit court for the said district, and the opinion of the court by Blatchford, C. J., is in the record. (R., pp. 10–15.)

ASSIGNMENT OF ERRORS.

1. In that the evidence offered by the defendants was improperly admitted.

2. In that the instruction prayed by the plaintiff was improperly refused.

ARGUMENT.

The first legislation providing for reduction of duties in consequence of damage to merchandise sustained during the voyage of importation is the 52d section of the act of 2d March, 1799 (1 Stats., p. 666), which, in so far as it relates to this subject, is, with an immaterial omission, re-enacted in section 2927 of the U. S. Revised Statutes, and is in these words:

SEC. 2927. In respect to articles that have been damaged during the voyage, whether subject to a duty ad valorem, or chargeable with a specific duty, either by number, weight, or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage so ascertained and certified shall be deducted from the original amount subject to a duty ad valorem, or from the actual or original number, weight, or measure on which specific duties would have been computed. No allowances, however, for the damage on any merchandise that has been entered and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may, on examining the same, prove to be damaged, shall be made, un-

less proof to ascertain said damage shall be lodged in the custom-house of the port where such merchandise has been landed within ten days after the landing of such merchandise.

As to both importations in this case the applications for damage allowance were made within ten days after entry, and there is scarce room for doubt, that if there had been no other legislation on the subject the refund in this case would have been entirely legal, as the eminent circuit judge states in his opinion.

The difficulty in the case grows out of the twenty-first section of the act of 1st March, 1823 (3 Stats., p. 736), which is re-enacted (saving an immaterial omission) in section 2928 of the Revised Statutes, and is in these words:

SEC. 2928. Before any merchandise which shall be taken from any wreck shall be admitted to an entry the same shall be appraised; and the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any merchandise shall have sustained in the course of the voyage; and in all cases where the owner, importer, consignee, or agent shall be dissatisfied with such appraisement, he shall be entitled to the privileges of appeal, as provided for in this title.

These provisions, as parts of two independent statutes, came before this court in 1866 in the case of Shelton *v.* The Collector (5 Wall.), upon the contention by the government that the act of 1823 in requiring that "*the same proceedings*" shall be taken in case of reduction of duties on account of damage sustained during the voyage rendered it imperative that the appraisal necessary in every such case should be made *before entry*, as in the case of importation of merchandise taken from a wreck; and this court sustained that view, holding that the act of 1823

had wrought an implied repeal of the act of 1799 in this particular.

It is true that in the case referred to the claim and proof for damage allowance had not been made within ten days after the landing of the merchandise, as required by the act of 1799, and that this failure to comply with the prescription of the statute was fatal to the claim, and so held to be by the court, but, at the same time, the judgment of the court was placed distinctly *on both grounds.*

But this decision made no impression on the practice of the Treasury Department, which has continued to refund duties on account of damage upon appraisements of damage made after the goods have been landed.

As we are advised, this has been in consequence of the impracticability, as it is said, of carrying out the law upon the construction of it adopted by the court, seeing that in the majority of cases the importer cannot know of the deterioration of his goods until he has had an opportunity to examine them by breaking the packages in which they are contained; a consideration which seems to have greatly influenced the learned circuit judge in expounding these provisions.

It is to be observed that perhaps the question now in hand is presented in a materially different aspect from that in which it was presented in Shelton *v.* The Collector (*supra*), for in the case at bar the two provisions, as parts of the Revised Statutes, are, it would seem, no longer to be regarded as belonging to separate statutes, but as parts of one and the same statute, and to be read accordingly. And, if so, section 2928 Revised Statutes, taken from

the act of 1823, is not to be viewed as repealing section 2927 Revised Statutes, taken from the act of 1799, but to be read in harmony with it, so that both provisions may have full effect.

If this view be founded, then the practice of the department would seem to be again in harmony with the law.

The question is respectfully submitted to the court.

WILLIAM A. MAURY,
Assistant Attorney-General.

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SUPREME COURT U.S.
FILED
JAN 23 1883
JAMES H. McKENNEY, Clerk.

17-320

SUPREME COURT OF THE UNITED STATES.

October Term, 1882. No. 178.

THE UNITED STATES,
Plaintiff in Error,

vs.

FRANK PHELPS AND HOWARD PHELPS,
Defendants in Error.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

CHARLES M. DA COSTA,
For Defendants in Error.

Evening Post Job Printing Office, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1882.—No. 178.

THE UNITED STATES,
Plaintiff in Error,

vs.

FRANK PHELPS AND HOWARD PHELPS,
Defendants in Error.

Brief on behalf of the Defendants in Error.

The Case.

The United States sued the defendants for the recovery of the sums of $863 and 288\frac{6}{100}$, a total of $1,151$\frac{6}{100}$, for certain alleged deficiencies in the payment of duties on two importations of lemons made by the defendants into the port of New York during the month of August, 1876 (Record, fol. 12). The defendants, on their part, proved (fols. 13 and 14) that the importations were respectively made and entered on the 7th and 15th days of August, 1876, on which days they paid to the plaintiff the estimated amount of duties on each importation, on the assumption

that all the lemons constituting each several importation were sound; that ascertaining thereafter that a portion of each of such cargo had become damaged on the voyage of importation, they applied for damage allowances, lodging the claim therefor, as to the first importation, on the 14th day of August, 1876, and as to the second, on the 23d day of August, 1876; that after examination and appraisement the entry of the first importation was liquidated on the 3d day of October, 1876, and an allowance for damage made in the sum of $863, which was refunded and paid by the plaintiff to the defendants on the 14th day of October, 1876; that after examination and appraisement the entry of the second importation was liquidated on the 29th of September, 1876, and allowance for damage made in the sum of $288\frac{60}{100}$, which was refunded and paid by the plaintiff to the defendants on the 11th day of October, 1876. These several sums, so refunded and paid, are the exact amounts which the United States in this action sought to recover (fols. 8 and 9), claiming that, as the entry of the several importations had been made before the applications for, and ascertainment of, the damage, the allowances made were irregular and without warrant of law; and that, therefore, they were entitled to recover the amount thereof in this action.

The cause was tried in the District Court of the United States for the Southern District of New York, before Judge Choate and a jury.

The court refused to rule in favor of the United States on the claim so made, to which refusals the United States tendered its bill of exceptions (fols. 12, 14 and 15).

The verdict was for the defendants.

On error to the Circuit Court the judgment was affirmed (see Opinion of Blatchford, J., fols. 20 to 24); and thereupon the United States sued out its writ of error to this court.

Point I.

Section 2927 of the Revised Statutes authorized the making of the several allowances.

It provides, in respect to articles "that have been damaged during the voyage," that it shall be the duty of the appraisers to ascertain and certify the damage, and, when so ascertained and certified, such damage "shall be deducted from the original amount, subject to a duty *ad valorem*, or from the actual or original number, weight or measure on which specific duties would have been computed."

It further enacts that

"No allowance, however, for the damage on any merchandise that *has been* entered, and on which the duties *have been* paid or secured to be paid, and for which a permit *has been* granted to the owner or consignee thereof, and which may, on examining the same, prove to be damaged, shall be made, unless proof to ascertain such damage shall be lodged in the Custom House of the port where such merchandise has been landed within ten days after the landing of such merchandise."

Briefly, therefore, allowances for damage are authorized *after* entry made, provided the claim therefor be lodged within ten days after the landing of the goods, as was done in the case at bar.

The proviso clause does not refer to merchandise which *will be* entered, or on which duties *will be* paid, or for which the permits *will be* granted, but, on the contrary, to merchandise which *has been* entered, or on which the original amount of duties *has been* paid, and for which the permit *has been* granted. In other words, the language of the section refers to the entry, payment of original duties, and obtaining permit to land as having taken place and been granted in the past, and not intended to be made or applied for in the future.

Point II.

In the courts below the United States did not contend that the several allowances made were not properly made, if section 2927 be alone considered; but it insisted that the language of the succeeding section 2928 was a virtual repeal of section 2927, in so far as the latter authorized allowance for damage to goods on the voyage of importation *after* entry made.

In other words, that an entry of goods was a legal bar to an application for the deductions authorized by section 2927, even though the damage be not astertained or ascertainable until after entry made.

Such contention on the part of the United States has no solid legal foundation, for:

(*a.*) It would require very plain language to authorize a court to hold that one section of an act of Congress was repealed by the immediately succeeding section of the same act.

(*b.*) There is no inconsistency between the two sections; section 2928, so far as the question of a prior entry is concerned, relating exclusively to *wrecked* goods—the language of the section being "before any merchandise, which may be taken *from any wreck*, shall be admitted to an entry, the same shall be appraised."

It is true that such section continues, "and the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any merchandise shall have sustained in the course of the voyage." This clearly applies only to the "proceedings" which the United States orders to be taken, and the manner of their execution, after the importer has presented his claim for allowance—which claim, in the case of wrecked goods only, must be presented before entry made, while, in all other cases, it can, by virtue of section 2927, be lodged at any time within ten days after the landing of the merchandise, which "*has been* entered," on which the duties "*have been* paid," and for which a landing permit "*has been* granted."

Point III.

Of necessity, there had to be, in the practical operation and enforcement of the customs laws, a difference between the time of the appraisal of merchandise regularly landed, and of that of wrecked goods.

Wrecked goods are landed on the territory of the United States without, as a general rule, the intervention of man. They are, therefore, landed without a possibility of prior entry, or permit to land.

The reverse is the case as regards merchandise regularly imported and landed.

The importer makes entry thereof in writing with the collector (section 2785 of the R. S.), who thereupon makes and endorses on such entry a gross estimate of the amount of duties, and after such duties have been paid or secured to be paid, grants a landing permit—all of which must be done "before it shall be lawful to land the merchandise" (section 2869). No merchandise is permitted to be unladen or otherwise removed from a vessel by an importer without a landing permit (section 2876). After entry made, the merchandise must be inspected and appraised. The importer may make additions to such entry in certain provided cases (sections 2899–2902). The appraisement becomes final, and fixes the duties to be paid, unless an appeal be taken as provided (sections 2929–2931).

The appraisement in respect to goods damaged on the voyage of importation is governed by the same rules (section 2943).

It is true that section 2900, which permits the importer to add to his entry, provides that "the duty shall not, however, be assessed upon an amount less than the invoice or entered value"; but this inhibition must, of course, be limited by the exceptions specifically provided by sections 2921 and 2927. By the former it is provided that, "if on the opening of any package a deficiency of any article shall be found on examination by the appraisers, the same shall be certified to the collector on the invoice, and an allowance for the same be made in estimating the duties." And by the latter it is enacted in respect to merchandise that

has been damaged during the voyage of importation, whether subject to an *ad valorem* or specific duty, that "the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate or percentage of damage *so ascertained and certified, shall be deducted from the original amount*, subject to a duty *ad valorem*, or from the actual or original number, weight or measure, on which specific duties would have been computed."

Point IV.

The plain meaning of section 2928 is that (after a claim has been made for damaged goods, which must be lodged in case of wrecked goods before entry, but in other cases at any time within ten days after entry and landing) "the proceedings" for the ascertainment and liquidation of such damage shall be conducted and executed in both instances alike.

This results not merely from the language used, but is further evidenced by considering the sections of the acts of Congress of which the two sections of the Revised Statutes now under consideration are virtual re-enactments.

The learned Circuit Judge, in his opinion (fols. 21 to 23), clearly and succinctly discusses the history of the prior legislation, and arrives at the result above claimed. As nothing could be added to such opinion, reference thereto is here only made. It suffices to state, generally, that section 2927 is a virtual re-enactment of section 52 of the Act of March 2, 1799 (1 U. S. Stat. at Large, 666), which related only to goods damaged during the voyage of importation, and which provided that such damage should be ascertained in the manner there indicated, and by appraisers, not sworn officers of the government, but one selected by the government, the other by the importer; and that section 2928 is a virtual re-enactment of section 21 of the Act of March 1, 1823 (3 U. S. Stat. at Large, 736), the words

"in the manner prescribed in the 16th section of this act" being omitted. Such 21st section related only to wrecked goods. The said 16th section provided that the appraisement was to be made by the sworn government appraisers (offices which had been created since the passage of the above-mentioned Act of March 2, 1799). Such 16th section is incorporated in sections 2529, 2544, 2549, 2558, 2560, 2569 and 2614 of the R. S.

Had section 21 of the Act of March 1, 1823, not contained language assimilating the procedure to ascertain the damages in cases of wrecked goods to those damaged during the voyage of importation, it would necessarily have resulted that the former would have to have been conducted by the sworn official appraisers of the Government, appointed by the 16th section of such act, while the latter, by two appraisers selected one by each party under the 52nd section of the Act of March 2, 1799, above referred to.

To obviate the radically essential difference of procedure was the object of the language used in said 21st section of the Act of 1823, that "the same proceedings shall be ordered and executed in both cases alike." This was re-enacted in section 2928 of the R. S.

If this be not the true construction to be given to the language of such last-named section, then it necessarily results that its preceding section is meaningless and without effect. Because, until merchandise is landed, it is impossible to ascertain any damage thereto. No landing can lawfully take place without a permit, and no permit can lawfully be granted without an entry. Therefore, if the entry be a pre-requisite to a claim for damage, it results that section 2927 would be impracticable in its actual operation, or in the language of the court below (Record, fol. 22), "to require appraisement beforeentry or landing, in the case of goods regularly imported, would be to prescribe a system impossible of practicable execution."

Point V.

The decision of this court in *Shelton* v. *Collector* (5 Wall., 113) is not adverse to the defendants' contention. In that case, it did not appear that any claim for damage had been lodged by the plaintiff within ten days after the landing of the goods. Furthermore, the United States having refused to allow the claim for damage, the plaintiff thereafter paid the entire duties under protest, and sought to recover back the amount of the damage. This court affirmed the judgment in favor of the United States on two grounds, viz.:

"One, that the requisite proof was not lodged in the Custom House within the time prescribed by the Act of 1799. The other, that the molasses was completely entered before the proceedings authorized by the Act of 1823 were demanded and taken." With great respect, it is suggested that the second ground of the decision was *obiter;* the case having been already finally disposed of by the first ground stated by the court. Such *obiter* expression was doubtlessly the result of a perhaps cursory reading of the Act of 1823, unaided, as the court was, by the argument of counsel, save on behalf of the United States.

Point VI.

The construction given to a statute by those charged with the duty of executing it, is always entitled to most respectful consideration, and ought not to be overruled without cogent reasons. (*United States* v. *Moore*, 95 U. S., 763; *United States* v. *Pugh*, 99 U. S., 269; *Swift & Co.* v. *United States*, 4 Morrison's Transcripts, 507).

The enquiry is, therefore, pertinent, what, if any, practical interpretation has the Treasury Department given to the sections of the Revised Statutes above quoted?

Its construction and practice sustain the defendants' position.

The Treasury regulations published in 1874 provide (Article 501), that the proof of damage "will consist of the

claim of the importer or his agent for the allowance, in writing subscribed, and sworn to by him, specifying by marks and numbers the particular articles or packages alleged to be damaged, the character of the goods, and the value at which he *has* entered them, and the official examination and assessment must be confined to the articles and packages *so specified*, and proven to have received damage during the voyage, except in the case of damage discovered in the appraiser's department as provided for in section 518. Collectors are instructed to reject all applications for damage allowance *not prepared in accordance herewith*."

Again, by article 502, the complaint must among other things state under oath, "that the same has sustained damage on the voyage of importation, *and has not been landed ten days from the vessel in which the importation was made*."

And by article 604, that "claims for damage on the voyage of importation must be made *within ten working days after the date of landing, wherupon the appraisers will make the requisite examination, determine the allowance to be made, and transmit their report to the collector without delay*."

See also, generally, articles 502 to 511, and articles 517 to 518.

The Treasury regulations of 1874 are still in force, and are continually practically followed by the Custom House officers.

Every claim for damage to goods during the voyage of importation, and every allowance thereon, has been and is, to the present moment, made in accordance with such Treasury regulations, and as the claims and allowances were made in the case at bar.

Prior to the enactment of the Revised Statutes, the Treasury Department had also issued two sets of regulations, one in 1857, and the other in 1869, both containing provisions similar to those above referred to, and based on the sections of the acts of Congress, of which the sections of the Revised Statutes were re-enactments.

(See Treasury regulations of 1857, articles 392, *et seq.*

Treasury Regulations of 1869, articles 179, *et seq.*)

Shelton v. *Collector* (*supra*), decided at the October Term, 1866, can no longer be considered an authority, in so far as it may be relied on to uphold the contention that the 16th section of the Act of 1823, repealed the 52d section of the Act of 1799, and that, therefore, section 2,928 of the Revised Statutes repealed by implication section 2927.

These two latter sections took effect simultaneously as of December 1, 1873 (section 5595), and, as was said in *United States* v. *Brown* (100 U. S., 508, 513), "the Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873."

There can now, therefore, be no claim of repeal by implication.

Point VII.

Irrespective, however, of the foregoing points, the rulings of the courts below were correct.

The facts, as presented, establish voluntary payments by the United States of claims against it, due *ex aequo et bono*, without any suggestion of fraud, of concealment, or of ignorance of any fact in making such payments. In other words, the United States seek to recover solely on the ground that such payments so made by it were made in ignorance of its statutory law.

Under elementary principles, if the suit were pending between private parties, no recovery could be had.

The Government being the plaintiff, does not change the applicability of such elementary legal rule.

The doctrine is now well settled that, when the Government comes into court as a plaintiff, it is bound by the same rules applicable to other parties in the same position; and that, save in exceptional cases arising from considerations of public policy, the same rule of law applies alike to the Government and to individuals (*United States* v. *Arrendondo*, 6 Peters, 711; *United States* v. *Bank of Metropolis*,

15 Peters, 377; *The People* v. *Brandreth*, 36 N. Y., 196; *The People* v. *Stevens*, 71 N. Y., 527).

An apt illustration of this doctrine is found by reference to two recent decisions in this court. In *Spofford* v. *Kirk* (97 U. S., 484), it was held that an assignment of a claim against the Government is void. In the subsequent case of *McKnight* v. *United States* (98 U. S., 185) it appeared that the accounting officers of the Government had recognized an assignment of a claim against the Government, and had paid upon such assignment to the assignee the sum of $21,678. The difference of the amount due by the United States to the assignee they refused to pay, on the ground of an alleged claim which the United States had against the assignor on another transaction. The assignee thereupon brought suit to recover such balance, and the United States set up as a counter-claim, and insisted upon its right to recover back the $21,678 which had been already paid to the petitioners.

Mr. Justice SWAYNE, in delivering the unanimous judgment of this court, said:

"The claim of the United States cannot be sustained. * * It is true the assignment was contrary to law and therefore a nullity, but there was nothing contrary to good morals or conscience in the payment or receipt of the money.

The facts were all known. There was no indirection, concealment, or improper purposes on either side. * * * * Under the circumstances, it is quite clear that, if the controversy were between private parties, there could be no recovery. * * With a few exceptions, growing out of considerations of public policy, the rules of law which apply to the Government and to individuals are the same. There is not one law for the former and another for the latter."

In the case at bar there was not merely nothing against good morals or conscience on the part of the defendants in asking for or receiving the money, but on the contrary, it is against good morals and conscience for the United States to refuse to pay it, because it would be clearly inequitable and unjust for the Government to claim and collect the same duties on damaged (*i. e.*, worthless) lemons as it does on sound ones.

The principles of *McKnight* vs. *The United States* (*supra*) were followed in *Hedrick* v. *United States* (16 Court of Claims, 88), the court ruling, that where a settlement is made at the Treasury between the Government and a private party in good faith, though under a mistaken construction of a statute, for services actually rendered at an honest valuation, the settlement cannot be reopened by one party without the consent of the other, and the Government cannot recover back the money so paid.

Point VIII.

The judgment should be affirmed.

CHARLES M. DA COSTA,
For Defendants in Error.